The Eighth Circuit's decision in *McBride v. Coleman*, 955 F.2d 571 (8th Cir. 1992) has no relevance to the Third Circuit's decision in this case. In *McBride* the plaintiffs, farmers who had borrowed money through a federal mortgage-insurance program, contended that federal officials had failed to fulfill an obligation they clearly had under a preliminary injunction to provide them with thirty days' advance notice of a loan deferment program before the government took steps toward foreclosure. The government had foreclosed upon the property and the borrowers suffered a great financial loss, for which the District Court awarded full compensation. The Eighth Circuit upheld the finding of liability, but overturned the damage award. The Circuit Court decided that the borrowers had failed to prove that their undisputed financial losses would have been avoided had the government officials provided the required thirty days' notice. In other words: the Circuit Court held there was no proof of causation. 955 F.2d at 576-577.

In the case at bar, causation was not, and could not be disputed. As a result of PHA's admitted failure to increase the utility allowances to reflect higher gas rates, the Tenants received allowances that were well below what they would have been had PHA adjusted the allowances to reflect the higher gas rates. Therefore, the *McBride* holding has no bearing on this one. A further indication that the two cases are not in conflict is that, but for one passing mention[6], the majority opinion in *McBride* did not discuss the construction

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the Decree and HUD's regulations. This offset of lower rates against higher rates is akin to the offset authorized in *Kuykendall*, and the decisions therefore are consistent.

[6] The Court noted, at p. 577, that the preliminary injunction imposed no duty to *forgive* the loan.

of the preliminary injunction, nor did the dissenting opinion. In the case at bar, however, the proper construction of the Consent Decree is the main focus of the dispute.

B. The Third Circuit's decision does not conflict with HUD's utility allowance regulations, nor does it conflict with the Fourth Circuit's interpretation of them:

The Third Circuit took care to harmonize the Consent Decree and HUD's utility allowance regulations, and in no respect does the decision create any conflict between the Decree and the regulations. Even if it did, that would not warrant granting PHA's petition. Nor does the Third Circuit's interpretation of the regulations conflict with the Fourth Circuit's interpretation of them.

In particular, contrary to PHA's claim, the Circuit Court's opinion does *not* "prohibit housing authorities from considering factors other than utility rates in revising their utility allowances." PHA brief, p. 11. PHA ignores two important distinctions which are made in both the Consent Decree and in HUD's regulations, distinctions between (A) *prospective* and *retroactive* adjustments to utility allowances, and (B) adjustments made necessary by changes in utility *rates* and adjustments based upon changes in housing authorities' estimates of *consumption*.

For the reasons the Third Circuit explained, neither HUD's regulations nor the Consent Decree permit PHA to adjust *retroactively* the utility allowances based upon changes PHA makes in its estimates of *consumption*. PHA is free, under both HUD's regulations and the Decree, to adjust allowances *prospectively* based upon changes in PHA's estimates of *consumption*. (Indeed, while the Tenants'

contempt motion was pending in the District Court, PHA did change prospectively (effective June 1, 2003) the consumption factor in the allowance calculation. The Tenants do not dispute that allowances may be changed *prospectively* if consumption declines.) When utility *rates* change by 10% or more, PHA is required by HUD's regulations and by the Decree to adjust allowances *retroactively* to reflect the rate changes.

The Fourth Circuit's decision in *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622 (4th Cir. 1993) does not conflict in any way with the decision of the Third Circuit here. *Dorsey* arose soon after HUD promulgated a final rule (largely unchanged today) which required housing authorities to develop, through a careful and thorough process, allowances for tenant-purchased utilities. The tenants in *Dorsey* contended that their housing authority never conducted the review required by HUD's final rule, instead merely continuing its historic utility allowances which it had adopted years earlier under an interim rule. The District Court granted summary judgment in favor of the housing authority, basing its ruling on unsubstantiated testimony by an authority official that the historic allowances were reasonable. The Circuit Court held that the District Court had erred in granting summary judgment to the housing authority. The case was remanded for trial, with instructions that the District Court take evidence about the reasonableness of the allowances.

The case at bar is obviously distinguishable from *Dorsey* in several ways. *Dorsey* did not involve construction of a consent decree at all, much less did it involve close analysis of a decree as this case did. Liability was disputed in *Dorsey*, whereas in the case at bar liability was conceded (only the amount of damages was disputed). The tenants in *Dorsey*

mounted a broad-based attack upon the authority's utility allowances, claiming they were unreasonable. Here, the Tenants' attack was focused upon one clear failure of PHA: its willful failure to raise allowances to reflect higher gas rates. The Fourth Circuit didn't reject the tenants' claim, it simply ruled that an evidentiary hearing was needed to assess whether the authority's failure to follow HUD-mandated procedures had resulted in allowances that were unreasonably low. Likewise, the Third Circuit remanded this case to the District Court for calculation of damages. (Of course, because of the nature of PHA's violation of the Decree and the lack any dispute about the changes in gas rates, the calculation of the damages should be straight-forward.)

C. The Third Circuit's decision does not conflict with – indeed, it has no bearing upon – decisions of the Supreme Court and other circuits concerning the measurement of damages for violations of procedural due process rights.

PHA cites two more cases from this Court, *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042 (1978) and *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537 (1986) [7], and two from other circuits[8], but none to

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[7] *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537 (1986) held that the plaintiff, a public school teacher who was suspended in violation of procedural due process and of the First Amendment, was entitled to compensatory damages for his actual losses, such as lost wages, but not for the abstract value of the rights of which he was deprived.

[8] The Second Circuit held in *Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005) that a commercial tenant who was abruptly evicted by the city without advance notice, on account of

any effect. The progenitor among these, *Carey,* held of course that where a student is expelled from school for violating school rules, and the school fails to give the student due process (a hearing at which to defend himself from the charge) the violation of the student's procedural right to a hearing cannot justify an award of compensatory damages for the expulsion if the school proves that had it held a hearing the student would have been expelled anyway.

The basic premise of PHA's argument – that its violation of the Decree, like the school's failure to give the students a hearing in *Carey*, was merely a "procedural" one from which no harm resulted – is completely unfounded. The Consent Decree, like HUD's regulations and ultimately the Brooke Amendment to the U.S. Housing Act[9], provides the Tenants with a *substantive* right to utility allowances that are adjusted to reflect changes of 10% or more in the rates Tenants must pay. To characterize that right as merely procedural is plainly wrong. To suggest that no harm resulted from PHA's failure, in violation of the Decree, to increase the allowances to reflect higher gas rates, likewise is plainly wrong. Therefore,

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his landlord's failure to pay city taxes, failed to show that his losses would have been less had he received advance notice of the eviction. The Court therefore affirmed the relatively modest award of damages.

The Eighth Circuit, in *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991) vacated the District Court's award of compensatory damages to a deputy sheriff who had been fired without a hearing, in violation of procedural due process. The Circuit remanded for a hearing on whether the deputy would have been fired anyway had the local government provided the required hearing.

[9] *See:* 42 U.S.C. §1437a(a)(1)(A); Third Circuit opinion, PHA appendix p. 2a.

the procedural due process cases cited by PHA do not conflict with the Third Circuit's decision here.

Conclusion

For the reasons discussed above, as well as those explained by the Court of Appeals for the Third Circuit, respondents respectfully urge the Court to deny the petition for certiorari.

Date: March 27, 2006

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